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Supreme Court of the United States

October Term, 1966

No. 851

DAVID J. MILLER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on October 13, 1966.

Citations to Opinions Below

There are two opinions by the United States District Court for the Southern District of New York, both by Hon. Harold R. Tyler, Jr., United States District Judge. The first opinion, denying petitioner's motion to dismiss, is

printed in the Appendix hereto, PA24,* and is reported at 249 F. Supp. 259. The second opinion of the District Court, finding the petitioner guilty after trial, is unreported and is printed at PA36. The opinion of the United States Court of Appeals is printed at PA3 and is reported at 358 F. 2d 696 (2d Cir. 1966).

Jurisdiction

The judgment of the United States Court of Appeals was entered on October 13, 1966. PA1. On November 9, 1966, Mr. Justice Harlan issued an order extending the time in which to file this petition for a writ of certiorari up to and including December 12, 1966. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Questions Presented for Review

1. Whether the August 30, 1965 amendment to Section 12(b)(3) of the Universal Military Service and Training Act, 50 U. S. C. App. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment, on its face, because the legislative history unequivocally reveals that the amendment to the statute was deliberately enacted for the purpose of suppressing dissent.

2. Whether, and if so to what extent, courts should examine the expressed legislative purpose to determine the

* "PA...." refers to the Appendix hereto.

constitutionality of a statute which affects freedom of expression.

3. Whether the statute, as applied to the facts in this case, is an unconstitutional abridgment of freedom of expression because the conduct which it sought to punish was a peaceful act of symbolic speech protected under the clear and present danger test, which the Court of Appeals refused to apply, but likewise protected under the balancing test, which the Court of Appeals incorrectly applied.

4. Whether the Court of Appeals erred in concluding that this Court no longer applies the clear and present danger test, either wholly, or in part, and has directed that the only standard to be applied in determining the constitutionality of statutes and prosecutions which affect First Amendment rights is the balancing test.

5. Whether the statute serves any legitimate purpose in the administration of the Selective Service System, or any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of individual liberty without due process of law, in violation of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

This case involves the First and Fifth Amendments to the United States Constitution.

The statute involved is P. L. 89-152, 79 Stat. 586, enacted on August 30, 1965, which adds certain language to Section

12(b)(3) of the Act, 50 U. S. C. App. §462(b)(3), as follows:

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such

certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury." (Language inserted by amendment emphasized.)

Statement of the Case

Petitioner was indicted in the United States District Court for the Southern District of New York on October 19, 1965. He was charged with knowing destruction and mutilation of a Selective Service Notice of Classification in violation of 50 U. S. C. App. §462(b)(3), as amended.

The proposed amendment, which became law on August 30, 1965, was introduced in the House by Rep. Rivers on August 5, 1965.* It was favorably reported by the House Committee on Armed Services on August 9, 1965. H. Rep. No. 747, 89th Cong., 1st Sess. The House Report stated that the Committee was:

> "* * * aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards." (PA41.)

The next day, Cong. Rivers, the bill's sponsor, explained the purpose of the bill on the floor:

> "It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards." (Cong. Rec.—House, August 10, 1965, at 19135; PA45.)

* The entire legislative history is documented in the Appendix hereto. PA40-PA60.

The bill was enacted in the House on August 10, 1965 by a vote of 393 to 1. PA50-PA54. On the same day Sen. Thurmond introduced an identical bill in the Senate, stating:

> "It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy." (Cong. Rec., August 10, 1965, at 19012; PA55.)

The report of the Senate Committee on Armed Services, submitted on August 12, 1965 by Sen. Thurmond stated that the bill resulted from the Committee taking notice "of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." Sen. Rep. No. 589, 89th Cong., 1st Sess. PA 56. The bill passed the Senate that same day. PA60. It received Presidential approval on August 30, 1965. P. L. 89-152, 79 Stat. 586.

Petitioner's violation of the amended statute occurred on October 15, 1965 at a public meeting held in New York City for the purpose of protesting United States foreign and military policy and the military draft. Since the meeting was held on one of the streets adjoining the United States Army Induction Center at 39 Whitehall Street, New York City, it was referred to by its sponsors as the "Whitehall Speakout". (Appellant's Appendix in Court of Appeals, pp. 37a-39a.)* The meeting was held with New York City Police authorization, a permit for sound amplification equipment having been duly applied for and received. 39a. A United States flag was in evidence as well as a banner

* "....a" refers to Appellant's Appendix in the Court of Appeals, a certified copy of which is being filed in lieu of a transcript of the record, pursuant to Rule 21(3).

which read "End the War in Vietnam." 46a. A large number of policemen were present, and efforts were made, via Police barricades, to separate persons described as "hecklers" from the main body of the audience. 63a.

The meeting was well-publicized. 37a, 40a-45a. An informational leaflet distributed by the sponsors before and after the meeting read in part:

> "* * * there will be *no civil disobedience.* Our job * * * is to communicate our views about the draft and the war in Vietnam to Selective Service employees, young men facing the draft and the many spectators in the street—and to do this as effectively as we can." (116a)

A number of speakers addressed the meeting, including petitioner, who was an advertised speaker, identified as being from the Catholic Worker. 116a. When petitioner was called to the microphone he said "he was not going to give a prepared speech." 69a. He also said he "was a Catholic pacifist and as such was opposed to all wars" and that he was "particularly opposed to war in Vietnam, and the conscripting of young men for that war." He stated that he "would let the action of burning [his] draft card speak for itself". He set fire to his Notice of Classification while standing on the platform in front of the audience. 69a.

Petitioner's symbolic act was characterized by other witnesses as being the "most eloquent statement of the meeting", as receiving "tremendous applause" and likewise "tremendous booing" from the hecklers. 63a. Petitioner stated at the trial that he burned his card "as a

symbolic protest in opposition to conscription, to the Selective Service System, to the war in Vietnam and to the draft card burning law itself." 76a.

Petitioner did not urge others to burn their cards. 28a, 51a, 70a. There was no testimony that anyone else burned draft cards at the meeting. 29a, 52a, 70a. Petitioner did not urge anyone to march anywhere or to do anything. 52a, 70a.

Petitioner testified that the decision to burn his draft card was entirely his own, and although he had been thinking about it earlier, he did not make the final decision until the night before he spoke. 67a, 70a. At the time of his appearance at the meeting, and prior thereto, he was a staff member of the Catholic Worker Movement which consists of a small number of lay Catholics who live in voluntary poverty and serve the poor in the Bowery section of New York City. The Catholic Worker Movement is also involved, according to petitioner's testimony, in working for peace, civil rights and social justice. He shared the views of the Movement in his opposition to war in any form, to the war in Vietnam and to compulsory military service. 64a, 65a.

Petitioner was arrested two days after the meeting, on October 17, 1965, in Hooksett, New Hampshire, while proceeding to St. Anselm's College as a member of a Catholic Worker peace team that had been invited to discuss pacifism with the student body. 71a. He was indicted on October 19, 1965. He pleaded not guilty on October 27, 1965. A motion to dismiss the indictment was timely made

and denied by written opinion of Judge Tyler on December 16, 1965. PA24. Petitioner was tried before Judge Tyler, without a jury, on February 9 and 10, 1966, and found guilty. PA36. He was sentenced by Judge Tyler on March 15, 1966 to a term of imprisonment of three years, execution suspended, and placed on probation for two years subject to the court's standing probation order plus certain special conditions of observance of Selective Service Regulations and obedience to orders of his Selective Service Local Board. PA21.

The judgment and opinion of the Court of Appeals, rendered October 13, 1966, affirmed the conviction.*

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal Constitutional law which should be settled by this Court, particularly since some of its holdings are in conflict with applicable decisions of this Court.

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* This is the first case of a conviction under the draft-card burning statute to be presented to this court. There have been several other convictions: *U. S.* v. *Smith,* 249 F. Supp. 515 (S. D. Iowa 1966) (sentence of probation), aff'd per curiam, —— F.2d —— (8th Cir., Nov. 7, 1966); *U. S.* v. *Edelman, et al.* (unreported) (S. D. N. Y. 1966) (three defendants sentenced to six months), appeal pending, 2d Cir.; *U. S.* v. *O'Brien* (unreported) (D. Mass. 1966) (defendant sentenced to 1 to 4 years under Youth Correction Act), appeal pending, 1st Cir.; *U. S.* v. *Reed* (unreported) (D. Mass. 1966) (defendant sentenced to three years, to run concurrently with three year sentence for refusal to report for induction). There have also been guilty pleas: *U. S.* v. *Wilson* (unreported) (S. D. N. Y. 1966) (sentence of probation); *U. S.* v. *Sullivan* (unreported) (S. D. N. Y. 1966) (defendant sentenced to 1 year). At least one other prosecution is pending: *U. S.* v. *Kiger,* S. D. N. Y.

I

Incensed by reports of draft card burnings by young men who were thereby symbolically expressing their opposition to the Vietnam War and the draft, Congress hurriedly amended the Universal Military Training and Service Act to make it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate. There were no legislative hearings. There were no requests for the legislation by the Selective Service System, or by any other agency concerned with national defense or military manpower. Nor were their views or comments solicited. The only legislative purpose, unequivocally expressed by statements of the sponsors and by committee reports in both houses, was to punish this form of symbolic dissent.

The Court of Appeals erroneously refused to acknowledge this clearly revealed unconstitutional purpose. It thereby validated a statute which, by its legislative history, is self-evidently a law abridging freedom of speech.

The entire legislative history is set forth in the Appendix hereto. PA40-PA60. The Court of Appeals acknowledged that "portions" of it,

> "particularly remarks by two Representatives (including the sponsor of the bill in the House)—indicate a desire to suppress political dissent"

PA9, but also pointed out that

> "the more authoritative committee reports also show a concern that destruction of draft cards 'represents a

potential threat to the exercise of the power to raise and support armies.' "[1]

The Court of Appeals' inference that only "portions" of the legislative history indicate a desire to suppress political dissent is not justified by a fair reading of all of the legislative history. The two representatives, Mr. Rivers (the House sponsor), and Mr. Bray, were the *only* ones who spoke about the bill on the House floor. In the Senate only Sen. Thurmond (the Senate sponsor) spoke. This is how he expressed the "need" for the legislation:

> "Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the government and have demonstrated an urgent need for this legislation." (Cong. Rec.—Senate, Aug. 13, 1965, at 19669) (PA59).

The Court of Appeals apparently concluded that the presence of the "power to raise and support armies" phrase in the Senate Report made the legislative history "inconclusive."

It is hard to imagine how much more conclusive the legislative history could be. Petitioner submits that the attempt by the Court of Appeals to paint a picture of un-

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1. The Court of Appeals refers at this point, via footnote 8, PA9, to both the Senate and House Reports. However, the quoted language comes only from the Senate Report, in the following context:

> "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." (PA57).

No such language appears in the House Report.

certainty is not borne out by the record. With all respect, by characterizing the legislative history as "inconclusive" the court seeks to paper over a real problem which it would have had to reach, had it acknowledged that the legislative history left no conclusion other than "a desire to suppress political dissent." That problem is whether or not it could strike down the statute as unconstitutional on its face, if it were convinced that the legislative purpose was unconstitutional.

II

The Court of Appeals expressed uncertainty as to whether the constitutionality of this statute—or any statute—on its face could be successfully attacked by reference to legislative history. Thus, the opinion states in one place that

> "going behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court." (PA8).

It states later:

> "We need not go so far as to say that an apparently innocuous statute can never be successfully attacked on the ground that the 'real' congressional motive behind it was impermissible. We say only that the occasions cited to us where this has allegedly been done successfully are few, [and] that they are in several ways distinguishable * * *" (PA11).[2]

2. The court distinguishes *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and *Lamont* v. *Postmaster-General*, 381 U. S. 301 (1965), aff'g sub nom. *Heilberg* v. *Fixa*, 236 F. Supp. 405 (N. D. Calif., S. Div. 1964) on the grounds that the statutes successfully attacked therein were directly concerned with "regulation

By the use of the word "motive" the court confused the essential difference between that which motivates an individual legislator to cast his vote, and the formal expression of collective legislative purpose via Committee reports, sponsors' explanatory statements, and similar authoritative sources. This distinction was elucidated by Circuit Judge Soper in *National Association for the Advancement of Colored People* v. *Patty*, 159 F. Supp. 503, 515, n. 6 (E. D. Va. 1958); rev'd other grounds, sub nom. *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167 (1959):

> "While it is well settled that a court may not inquire into the legislative motive (Tenney v. Brandhove, 341 U. S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019), it is equally well settled that a court may inquire into the legislative purpose. (See Baskin v. Brown, 4 Cir., 174 F. 2d 391, 392-393, and Davis v. Schnell, D. C., 81 F. Supp. 872, 878-880, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L.Ed. 1093, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment.) Legislative motive—good or bad—is irrelevant to the process of judicial review; but legislative purpose is of primary importance in determining the propriety of legislative action, since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accom-

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of ideas or the means of communicating them", PA9, while here the statute "on its face" concerns administration of the draft. But the Court of Appeals did not distinguish *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) and *NAACP* v. *Alabama*, 357 U. S. 449 (1958), which were also cited to the court as successful constitutional attacks on statutes via legislative history, in neither of which the statute "on its face" concerned regulation or communication of ideas. Moreover, the validity of this distinction may be seriously questioned. If the legislative history of a statute unequivocally reveals a purpose of suppressing political dissent, the avoidance of blatantly repressive language should not immunize it from constitutional attack. *Cf. Lane* v. *Wilson*, 307 U. S. 268 (1939).

plish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in Davis v. Schnell, D. C., 81 F. Supp. at page 878; but such ambiguity is not the *sine qua* for a judicial inquiry into legislative history. See the decision in Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L.Ed. 1281, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the 'grandfather' clause of an earlier statute had been held void."[3]

Circuit Judge Brown, dissenting in *Gomillion* v. *Lightfoot*, 270 F. 2d 594, 608 (5th Cir. 1959), reversed 364 U. S. 339 (1960), admonished his fellow Circuit Judges that

> "We need not be that 'blind' court that Mr. Chief Justice Taft described as unable to see what 'all others can see and understand * * *' Bailey v. Drexel Furniture Co. [Child Labor Tax Case], 1922, 259 U. S. 20, 37 * * *"

The majority Judges in the 5th Circuit in *Gomillion* held themselves barred from examining what they referred to as the legislative motive. To this, Judge Brown responded:

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3. *Cf.* Mr. Justice Douglas' concurring opinion in *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445-446 (1963):

> "The Virginia Act * * * reflects a legislative purpose to penalize the NAACP because it promotes the desegregation of the races.
>
> "* * * Judge Soper, writing for the Court in NAACP v. Patty * * * did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision * * * [T]hey made clear the purpose of the present law—as clear a purpose to evade our prior decision as was the legislation in *Lane* v. *Wilson* * * *"

> "What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed in Part V, *supra*, attest. All that Doyle can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor." (Footnote omitted.) *Id.* at 610.

Statements of precisely such startling candor were uttered by Representative Rivers and Senator Thurmond in enacting the statute here under attack. This Court should recognize them for what they were, and at the same time clarify the permissibility of lower courts doing likewise in appropriate cases.

III

Petitioner contends that the ceremonial burning of a draft card at a public meeting, for the purpose of dramatizing an anti-war, anti-draft speech, is symbolic speech within the protection of the First Amendment. This Court has held that protected symbolic speech includes such conduct as the display of a red flag, *Stromberg v. California*, 283

U. S. 359 (1931); peaceful picketing, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), *Carlson* v. *California*, 310 U. S. 106 (1940), *Milk Wagon Drivers Union* v. *Meadowmoor*, 312 U. S. 287 (1941), cf. *Cox* v. *Louisiana*, 379 U. S. 536, 555 (1965); and the refusal to obey a statute compelling school children to salute the flag, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The "prevailing opinion" of this Court in *Brown* v. *Louisiana*, 383 U. S. 131 (1966), and the concurring opinion of Mr. Justice Harlan in *Garner* v. *Louisiana*, 368 U. S. 157, 201-02 (1961), have expressed the view that peaceful civil rights demonstrations, a "sit-in" in *Garner*,[4] and a "stand-up" in *Brown*,[5] are likewise protected as symbolic speech. First Amendment rights "are not confined to verbal expression. They embrace appropriate types of action * * *." *Brown* v. *Louisiana*, at 142.[6]

4. "Such a demonstration, in the circumstance of these two cases, is as much a part of the 'free trade in ideas', *Abrams* v. *U. S.*, 260 U. S. 616, 630 (Holmes, J. dissenting), as is verbal expression, more commonly thought of as 'speech.' It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion', *Whitney* v. *California*, 274 U. S. 357, 375 (Brandeis, J. concurring), just as much as, if not more than, a public oration delivered from a soap box at a street corner." *Ibid.* *Cf.* Kalven, *The Negro and the First Amendment* 131 (1965).

5. Mr. Justice Brennan in his Concurring Opinion in *Brown*, 383 U. S. at 146, appears to adopt the views of Mr. Justice Harlan in *Garner*. See also Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 4 (1965).

6. Summarizing the symbolic speech decisions of this Court, Chief Judge Sobeloff has written:

> "The First Amendment affords protection not merely to the voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy."

National Labor Relations Board v. *International Longshoremen's Association*, 332 F. 2d 992, 999 (4th Cir. 1964).

The Court of Appeals devoted considerable attention to discussing the symbolic speech doctrine. PA11-PA14. It posed a number of interesting hypothetical questions about different forms of conduct which might be characterized as symbolic speech. But it did not rule on whether or not the draft-card burning ritual was or was not symbolic speech.[7] Instead, it proceeded to discuss the proper constitutional test, ruled that the balancing test was to be applied, and held that even if the conduct in question was symbolic speech, it was not that kind of symbolic speech which was protected by the First Amendment. PA15.

Petitioner urges that the court below erred in not finding that the ceremonial burning of a draft card was well within the long line of decisions of this Court which have protected symbolic speech.

Moreover, petitioner submits that a decision by this Court as to the proper metes and bounds of protected symbolic speech is a constitutional issue of public importance, separate and apart from the issue of the proper constitutional test to be applied. With the proliferation of public demonstrations expressing dissent to governmental authorities on many questions, and the constant emergence of new and unprecedented forms of demonstration,[8] there is an obvious public interest in this Court's providing guide-

7. "We are not at all sure that destroying a draft card, even at a public rally, must be regarded as an exercise of speech, but we are willing to assume it *arguendo* * * *." PA14.

8. Compare *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Adderley* v. *Florida*, —— U. S. ——, 35 U. S. L. Week 4013 (Nov. 14, 1966).

lines for the benefit of Congress, police authorities, and potential demonstrators.[9]

IV

Petitioner's counsel are not aware of any other case where a Court of Appeals has so explicitly ruled that it may not apply the clear and present danger test because of its reading of the decisions of this Court.[10] PA16. Obviously, if the Court of Appeals was in error in this respect, its judgment must be reversed.[11]

Moreover, there can hardly be a constitutional question of greater public importance in the entire area of First Amendment rights, then the need for clarification by this Court as to whether or not lower courts, in reviewing Governmental action in the area of the First Amendment, must apply the balancing test, or the clear and present danger test, or are free to apply either.[12]

Petitioner urges that under either standard the verbal conduct of which he stands convicted is protected by the

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9. *Cf. Turner* v. *New York*, —— U. S. ——, 35 U. S. L. Week 3147 (Oct. 25, 1966), where this Court granted certiorari to review convictions of disorderly conduct arising from an anti-Vietnam war demonstration in Duffy Square, in midtown Manhattan.

10. The court held that such decisions "seem to require" the use of the balancing test. It relied principally on *American Communications Assn.* v. *Douds*, 339 U. S. 382 (1950), holding that its exposition of the balancing test is still valid notwithstanding *United States* v. *Brown*, 381 U. S. 437 (1965).

11. This Court has applied the clear and present danger test most recently in *Wood* v. *Georgia*, 370 U. S. 375 (1962). See also *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Taylor* v. *Mississippi*, 319 U. S. 583 (1943); *Bridges* v. *California*, 314 U. S. 252 (1941); *Herndon* v. *Lowry*, 301 U. S. 242 (1937).

12. For a critique of the balancing test see Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962). For an analysis of both tests, which expresses a preference for the clear and present danger test, see Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 910-912, 912-914 (1963).

First Amendment and the conviction must be reversed. If this Court holds that the clear and present danger test is not to be applied, and the balancing test is to be applied, it is of equal public importance that the balancing test should be properly applied so that restrictions on freedom of speech shall be kept within proper constitutional limits.[13]

V

Petitioner urges that the statute, both on its face and as applied, is an unconstitutional deprivation of liberty without due process of law, since the statute serves no rational legislative purpose. The Court of Appeals misinterpreted petitioner's argument based on substantive due process as being no more than an attack on the wisdom of the statute. PA20.

It is true that the due process clause may no longer be used to strike down industrial or regulatory laws "because they may be unwise * * *" *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955). But where a statute involves an infringement of individual liberty, as distinguished from economic or business regulation,[14] the due process clause

13. The Court of Appeals' weighing of the government-interest side of the balance, PA17, consists of the itemization of a number of possible advantages which retention of the Selective Service Notice of Classification might have for the *registrant*. But in terms of benefit to the *government*, so as to legitimatize the requirement, it refers only to "fire or other disaster" necessitating reconstruction of files, and to "extreme emergency (*e.g.*, a call-up by radio)". The trial court, although it referred in both opinions to the administrative advantages to the Selective Service System, at no point specified even a single one. See PA30, PA31, PA39. The Court of Appeals' attempt to fill this interstice is not persuasive.

14. *Cf. Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Thomas* v. *Collins*, 323 U. S. 516, 529-530 (1945); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *A. F. of L.* v. *Swing*, 312 U. S. 321, 325 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).

requires a justification of the statute's legitimate legislative purpose. See *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400 (1923).[15]

In its defense of individual liberty, substantive due process establishes limitations "upon all powers of Congress, even the war power." *Galvan* v. *Press,* 347 U. S. 522, 530 (1954). This Court should grant certiorari to dispel the uncertainty which apparently continues to persist, concerning the scope of this important constitutional limitation.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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15. *Cf.* Mr. Justice Goldberg, concurring in *Griswold* v. *Connecticut, supra* at 492:

> "As any student of this Court's opinions knows, this Court has held, often unanimously, that the 5th and 14th Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States". (citing cases)